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** pro hac vice to be filed*

ATTORNEYS FOR DEFENDANT

WELLS FARGO BANK, N.A.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

KIRBY SPENCER,

Plaintiff,

vs.

WELLS FARGO BANK, N.A.,

Defendant.

Case No. 2:14-cv-01648-LDG-GWF

DEFENDANT WELLS FARGO BANK, N.A.'s SURREPLY IN FURTHER OPPOSITION

TO PLAINTIFF'S MOTION TO AMEND

[REQUEST FOR ORAL ARGUMENT]

**DEFENDANT WELLS FARGO BANK, N.A.’s SURREPLY IN FURTHER OPPOSITION
TO PLAINTIFF’S MOTION TO AMEND**

Plaintiff’s reply brief greatly expands upon arguments made in the initial moving papers and in a misleading way. Specifically, in reply the Plaintiff now makes the unsupported argument that: “Defendant’s automated telephone dialing operation suffers from a critical defect such that, even when a lawsuit is filed to stop any further calls from occurring, the system is still incapable of preventing unauthorized robocalls from being placed.” Doc. 24 at p. 8.

The Court should have the true facts before it in assessing the Plaintiff’s motion for leave to amend. The facts are:

1. Wells Fargo Bank, N.A. (“Wells Fargo”) was served with process in this case on November 12, 2014.

2. Per the admissions made in the Plaintiff’s reply brief (Doc. 24 at p. 3) the calls stopped the same day service took place.

3. The earliest Wells Fargo’s counsel was aware of this lawsuit was November 6, 2014. On that day Plaintiff’s counsel Craig Perry directed his assistant to send an e-mail to an associate with Wells Fargo’s outside counsel Severson & Werson, APC located in California. The e-mail

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1 attached a “courtesy copy” of the amended complaint. A true and correct copy of that e-mail is
2 attached hereto as Exhibit “A.”

3 Dated this 9th day of March, 2015.
4
5

6 /s/ Kimberly P. Stein
7 KIMBERLY P. STEIN (Nevada Bar No. 8675)
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23 Attorneys for Defendant WELLS FARGO BANK,
24 N.A.

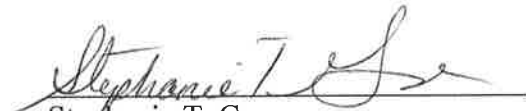
25 * *seeking admission pro hac vice*
26
27
28

CERTIFICATE OF ELECTRONIC FILING AND CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on March 9, 2015, I electronically filed a true and correct copy of the foregoing document with the Clerk of this Court using the CM/ECF system, which sent notification of such filing to the following:

Craig K. Perry, Esq.
Craig K. Perry & Associates
8010 W. Sahara Avenue, Suite 260
Las Vegas, NV 89117

Executed on March 9, 2015, at Las Vegas, Nevada.


Stephanie T. George

4846-1246-6466, v. 1

EXHIBIT A

From: liz@craigperry.com
Sent: Thursday, November 06, 2014 1:28 PM
To: Divya S. Gupta
Subject: Spencer vs. Wells Fargo, Case Number 2:14-cv-01648-LDG-GWF
Attachments: Spencer vs. Wells Fargo Amended Complaint Case No 214-cv-01648-LDG-GWG.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Ms. Gupta,

Per Mr. Perry's instruction attached hereto please find courtesy copy of the amended complaint on the above-noted matter along with the supporting evidence of the calls.

Mr. Perry has asked me to forbear serving the complaint and asked if you would kindly contact him to discuss this matter or direct our office as to whom he can discuss the case with.

Respectfully,

Liz

Legal Assistant/Office Manager | 8010 West Sahara Avenue, Suite 260 Las Vegas, NV 89117
| (phone: 702.228-4777<tel:702.228-4777> | 7 fax: 702.943-7520<tel:702.943-7520> | * e-mail:
liz@craigperry.com<mailto:liz@craigperry.com> Electronic Privacy Notice. This e-mail, and any
attachments, contains information that is, or may be, covered by electronic communications
privacy laws, and is also confidential and proprietary in nature. If you are not the intended
recipient, please be advised that you are legally prohibited from retaining, using, copying,
distributing, or otherwise disclosing this information in any manner. Instead, please reply
to the sender that you have received this communication in error, and then immediately delete
it. Thank you in advance for your cooperation.

<<http://www.avast.com/>> This email is free from viruses and malware because avast!
Antivirus<<http://www.avast.com/>> protection is active.

1 Craig K. Perry, Esq.
Nevada Bar # 3786
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4 Phone: (702) 228-4777
Fax: (702) 943-7520
5 E-mail: info@1sttoplawfirm.com
6 Attorney for Plaintiff

7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**

9 Kirby Spencer,

10 Plaintiff,

11 vs.

12 Wells Fargo Bank, N.A.,

13 Defendant.
14

CASE NO. 2:14-cv-01648-LDG-GWF

AMENDED COMPLAINT FOR
DAMAGES FOR VIOLATION OF THE
TELEPHONE CONSUMER PROTECTION
ACT, 47 U.S.C. § 227 ET. SEQ.

JURY TRIAL DEMANDED

15 **AMENDED COMPLAINT**

16
17 COMES NOW Spencer Kirby (hereafter referred to as "Plaintiff"), by and through his attorney,
18 Craig K. Perry, Esq. of the law firm of Craig K. Perry & Associates, and alleges the following against
19 Wells Fargo Bank, N.A. (hereafter referred to as Defendant "Wells Fargo").

20 **INTRODUCTION**

21 1. Plaintiff's Amended Complaint is based on the Telephone Consumer Protection Act, 47
22 U.S.C. § 227 *et seq.* (hereafter referred to as "TCPA").
23

24 **JURISDICTION AND VENUE**

25 2. Jurisdiction of this Court arises pursuant to 47 U.S.C. § 227(g)(2), and 28 U.S.C. § 1331
26 grants this court original jurisdiction of all civil actions arising under the laws of the United States.
27
28

4. Venue in this District is proper pursuant to 47 U.S.C. § 227(e)(6)(E)(i), which incorporates by reference 28 U.S.C. § 1391, of which the following subsections apply: (b)(2), because a substantial part of the events giving rise to the claim arose in Nevada, and (c)(1), because Plaintiff is a resident of the state of Nevada.

PARTIES

7. Plaintiff is both a "person" and "called party" as those terms are used or defined in 47 U.S.C. § 227.

9. Wells Fargo is properly referred to as both a "person" and a "caller" as those terms are used or defined in 47 U.S.C. § 227.

10. Plaintiff repeats, re-alleges, and incorporates by reference paragraphs 1 through 9, inclusive, above.

2

1 Robocalls are not permitted when there is neither (1) an established business relationship (see §
2 227(a)(2) nor (2) prior express consent (see § 227(b)(1)(A)).

3 12. Plaintiff sent a letter concerning the problem by certified mail to Wells Fargo, requesting
4 a cease and desist of their repeated calls to his cell phone, and advising them that he did not give Wells
5 Fargo or any of its assignees or representatives permission to contact him on his cell phone. According
6 to USPS tracking records, that letter was delivered to and received by Wells Fargo on September 2,
7 2014. (See Exhibit 2.) As of the date of the filing of this complaint, that letter never received an
8 answer.
9

10 13. From August 5, 2014 through September 30, 2014, a total of 70 calls were made on
11 behalf of Wells Fargo to Plaintiff's cell phone. Calls 1 through 40, which were made August 5, 2014
12 through September 2, 2014, were made willfully, and calls 41 through 70, which were made
13 September 3 through September 30, 2014, were made knowingly.
14

15 14. These calls violate the Telephone Consumer Protection Act, 47 U.S.C. § 227. Such calls
16 are not permitted when there is neither (1) an established business relationship (see § 227(a)(2) nor
17 (2) prior express consent (see § 227(b)(1)(A)).
18

19 15. Wells Fargo does not have an established business relationship with Plaintiff.

20 16. Wells Fargo did not have the prior express consent of the Plaintiff before making the
21 calls to Plaintiff.
22

23 17. It has been necessary for Plaintiff to obtain the services of an attorney to pursue this
24 claim, and Plaintiff is entitled to recover reasonable attorney's fees therefor.

25 ///

26 ///

27
28

FIRST CLAIM FOR RELIEF

DEFENDANT VIOLATED THE TELEPHONE CONSUMER PROTECTION ACT

18. Plaintiff repeats, re-alleges, and incorporates by reference paragraphs 1 through 17, inclusive, above.

19. Section 227(b)(3)(A) of the TCPA authorizes a private cause of action for a person or entity to bring in an appropriate court of that state “an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation.”

20. Section 227(b)(3)(B) of the Act authorizes a private cause of action for a person or entity to bring in an appropriate court of that state “an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater.”

21. Despite the fact that Plaintiff never consented to Wells Fargo making calls to his cellular telephone, Wells Fargo repeatedly placed these non-emergency calls to Plaintiff’s cellular telephone without Plaintiff’s consent.

22. The Act also authorizes the Court, in its discretion, to award up to three (3) times the actual damages sustained for violations when they are done “willfully and knowingly.”

23. Here, upon information and belief, Wells Fargo repeatedly and regularly sent nonemergency, automated calls to the Plaintiff’s cellular telephone after Plaintiff repeatedly contacted Wells Fargo in an effort to prevent further violations from occurring.

24. Wells Fargo did not have Plaintiff’s express consent prior to contacting him on his cellular telephone using an automatic telephone dialing system or pre-recorded or artificial voice.

WHEREFORE, Plaintiff respectfully prays that this Court grant the following relief in Plaintiff’s favor and that a judgment be entered against Defendant Wells Fargo for the following:

(1) Actual damages;

- 1 (2) Statutory damages up to \$1,500 per violation;
2 (3) Reasonable attorney's fees and costs; and
3 (4) Any other relief deemed appropriate by this Honorable Court.
4

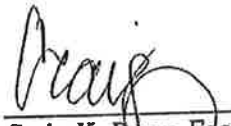
5 **DEMAND FOR JURY TRIAL**

6 PLEASE TAKE NOTICE that Plaintiff demands a trial by jury in this case.

7 RESPECTFULLY SUBMITTED,

8 DATED: October 24, 2014

9 CRAIG K. PERRY & ASSOCIATES

10 

11 Craig K. Perry, Esq.
12 Nevada Bar #3786
13 8010 W. Sahara Ave., Suite 260
14 Las Vegas, Nevada 89117
15 (702) 228-4777
16 (702) 942-7520 Fax
17 info@1stoplawfirm.com
18
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21
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EXHIBIT 1

CALL LOG

<u>CALL #</u>	<u>CALL DATE</u>	<u>CALL TIME</u>	<u>CALL FROM #</u>	<u>RESULT OF CALL</u>	<u>EVIDENCE</u>
1	8/5/2014	9:03:00	8776478552	hang up / no voicemail	pic
2	8/6/2014	9:17:00	8776478552	hang up / no voicemail	pic
3	8/7/2014	9:12:00	8776478552	hang up / no voicemail	pic
4	8/8/2014	8:21:00	8776478552	hang up / no voicemail	pic
5	8/8/2014	9:59:00	8776478552	hang up / no voicemail	pic
6	8/9/2014	9:54:00	8776478552	hang up / no voicemail	pic
7	8/12/2014	9:23:00	8776478552	hang up / no voicemail	pic
8	8/12/2014	15:43:00	8776478552	hang up / no voicemail	pic
9	8/12/2014	16:39:00	8776478552	hang up / no voicemail	pic
10	8/13/2014	9:19:00	8776478552	hang up / no voicemail	pic
11	8/14/2014	10:25:00	8776478552	hang up / no voicemail	pic
12	8/14/2014	15:32:00	8776478552	hang up / no voicemail	pic
13	8/14/2014	16:35:00	8776478552	hang up / no voicemail	pic
14	8/15/2014	8:20:00	8776478552	hang up / no voicemail	pic
15	8/15/2014	10:22:00	8776478552	hang up / no voicemail	pic
16	8/15/2014	10:57:00	8776478552	hang up / no voicemail	pic
17	8/19/2014	16:41:00	8776478552	hang up / no voicemail	pic
18	8/20/2014	8:56:00	8776478552	hang up / no voicemail	pic
19	8/21/2014	9:10:00	8776478552	hang up / no voicemail	vid
20	8/21/2014	11:30:00	8776478552	hang up / no voicemail	vid
21	8/22/2014	8:19:00	8776478552	hang up / no voicemail	pic
22	8/22/2014	10:53:00	8776478552	hang up / no voicemail	pic
23	8/22/2014	11:47:00	8776478552	hang up / no voicemail	pic
24	8/26/2014	8:39:00	8776478552	hang up / no voicemail	vid
25	8/26/2014	14:46:00	8776478552	hang up / no voicemail	pic
26	8/26/2014	15:22:00	8776478552	hang up / no voicemail	pic
27	8/27/2014	14:29:00	8776478552	hang up / no voicemail	pic
28	8/27/2014	16:41:00	8776478552	hang up / no voicemail	pic
29	8/28/2014	9:04:00	8776478552	hang up / no voicemail	pic
30	8/28/2014	11:56:00	8776478552	hang up / no voicemail	pic
31	8/28/2014	13:40:00	8776478552	hang up / no voicemail	pic
32	8/29/2014	8:10:00	8776478552	hang up / no voicemail	pic
33	8/29/2014	8:47:00	8776478552	hang up / no voicemail	pic
34	8/29/2014	9:31:00	8776478552	hang up / no voicemail	pic
35	8/30/2014	8:12:00	8776478552	hang up / no voicemail	pic
36	8/30/2014	8:47:00	8776478552	hang up / no voicemail	pic
37	8/30/2014	9:30:00	8776478552	hang up / no voicemail	pic
38	9/2/2014	8:28:00	8776478552	hang up / no voicemail	pic
39	9/2/2014	9:48:00	8776478552	hang up / no voicemail	pic
40	9/2/2014	10:24:00	8776478552	hang up / no voicemail	pic
41	9/3/2014	8:44:00	8776478552	hang up / no voicemail	pic
42	9/3/2014	15:18:00	8776478552	hang up / no voicemail	pic
43	9/3/2014	15:53:00	8776478552	hang up / no voicemail	pic
44	9/4/2014	10:42:00	8776478552	hang up / no voicemail	pic

45	9/5/2014	8:24:00	8776478552 hang up / no voicemail pic
46	9/5/2014	13:06:00	8776478552 hang up / no voicemail pic
47	9/5/2014	13:56:00	8776478552 hang up / no voicemail pic
48	9/16/2014	9:44:00	8776478552 hang up / no voicemail pic
49	9/16/2014	12:38:00	8776478552 hang up / no voicemail pic
50	9/16/2014	13:13:00	8776478552 hang up / no voicemail pic
51	9/17/2014	10:45:00	8776478552 hang up / no voicemail pic
52	9/18/2014	9:28:00	8776478552 hang up / no voicemail pic
53	9/18/2014	14:46:00	8776478552 hang up / no voicemail pic
54	9/18/2014	15:22:00	8776478552 hang up / no voicemail pic
55	9/19/2014	9:29:00	8776478552 hang up / no voicemail pic
56	9/19/2014	11:57:00	8776478552 hang up / no voicemail pic
57	9/19/2014	13:27:00	8776478552 hang up / no voicemail pic
58	9/23/2014	9:44:00	8776478552 hang up / no voicemail pic
59	9/23/2014	12:52:00	8776478552 hang up / no voicemail pic
60	9/23/2014	13:28:00	8776478552 hang up / no voicemail pic
61	9/24/2014	9:48:00	8776478552 hang up / no voicemail pic
62	9/24/2014	16:48:00	8776478552 hang up / no voicemail pic
63	9/25/2014	9:52:00	8776478552 hang up / no voicemail pic
64	9/25/2014	15:30:00	8776478552 hang up / no voicemail pic
65	9/25/2014	16:34:00	8776478552 hang up / no voicemail pic
66	9/26/2014	8:30:00	8776478552 hang up / no voicemail pic
67	9/26/2014	9:46:00	8776478552 hang up / no voicemail pic
68	9/27/2014	8:19:00	8776478552 hang up / no voicemail pic
69	9/27/2014	15:15:00	8776478552 hang up / no voicemail pic
70	9/30/2014	9:19:00	8776478552 hang up / no voicemail pic

EXHIBIT 2

August 30, 2014

Certified U.S. Mail # 7008 1140 0001 2355 6342

WELLS FARGO (WF)
420 Montgomery St.
7th Floor
San Francisco, CA 94104

RE: REQUEST TO CEASE AND DESIST CALLING ME
ON MY CELL 702-285-9382

Dear WF,

I request that you cease and desist your repeated calls to my cell phone 702-285-9382.

I began receiving calls from WF on August 5, 2014. I have not given WF nor any of its assignees or representatives permission to contact me on my cell phone 702-285-9382. Permission is hereby revoked if you think that you have any evidence to the contrary.

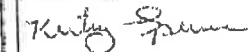
These calls are very annoying, unauthorized and are being made to my cell phone without my permission.

This is an effort to stop the repeated violations of law.

I am in contact with my attorney concerning the calls. The easiest way for you to reach me / notify me that you have received this letter is kirby.teamworx@gmail.com.

I am holding WF responsible for each call as permitted by law.

Sincerely,



Kirby Spencer
2654 W. Horizon Ridge Pkwy.
B-5 #334
Henderson, NV 89052
kirby.teamworx@gmail.com

9/18/2014

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Certified Mail™**DATE & TIME****September 2, 2014 , 11:20
am****STATUS OF ITEM****Delivered****LOCATION****SAN
FRANCISCO, CA 94103**

Your item was delivered at 11:20 on on September 2, 2014 in San Francisco, CA 94103

**September 2, 2014 , 10:26
am****Out for Delivery****SAN
FRANCISCO, CA 94105****September 2, 2014 , 10:16
am****Sorting Complete****SAN
FRANCISCO, CA 94105****September 2, 2014 , 8:52
am****Arrived at Unit****SAN
FRANCISCO, CA 94105****September 1, 2014 , 5:20
am****Departed USPS Facility****SAN
FRANCISCO, CA 94188****August 30, 2014 , 8:38 pm****Arrived at USPS Facility****SAN
FRANCISCO, CA 94188****August 30, 2014 , 6:54 pm****Departed Post Office****NOVATO, CA 94945****August 30, 2014 , 4:10 pm****Acceptance****NOVATO, CA 94945**

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